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Karel Raba

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## Thirty Years of *Adams v. Howerton*:<sup>1</sup> Changed Circumstances, DOMA,<sup>2</sup> and a Vision of a DOMA-Free World

By Karel Raba\*

### INTRODUCTION

February 25, 1982, was a bittersweet day for gay rights activists. That Thursday, Wisconsin Governor Lee Dreyfus signed into law a bill prohibiting employment discrimination based on sexual orientation.<sup>3</sup> Wisconsin became the first state to enact such a statute.<sup>4</sup> In bad news, the Ninth Circuit denied spousal status to a same-sex bi-national couple in *Adams v. Howerton*.<sup>5</sup> By rationalizing the limitation of the term “marriage” to opposite-sex couples for purposes of federal immigration law, it served as both a predecessor to the Defense of Marriage Act (DOMA) and later as its justification.<sup>6</sup> In light of recent attempts at invalidating DOMA, *Adams* must be well understood for it may become guiding precedent in the Ninth Circuit if DOMA is repealed without replacement.<sup>7</sup>

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\* JD, Chapman University (2013); BA, Earlham College (2008). The author wishes to thank Professor Marisa Cianciarulo and Associate Dean Jayne Kacer for their guidance and support and to dedicate this work to Robert Gagnon.

<sup>1</sup> *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

<sup>2</sup> The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

<sup>3</sup> Ch. 112, 1981 Wis. Sess. Laws; William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 91 n.1 (2007). It took another nine years before another state passed a similar statute. Turner, *supra*, at 93; *see, e.g.*, Act 2, sec. 1, 1991 Haw. Sess. Laws 3, 3; Act 2, sec. 3, 1991 Haw. Sess. Laws 4–5.

<sup>4</sup> Turner, *supra* note 3, at 93.

<sup>5</sup> *Adams*, 673 F.2d at 1043. The Ninth Circuit decided the case on February 25, 1982. *Id.*

<sup>6</sup> The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006) (limiting “marriage” to “a legal union between one man and one woman”); 28 U.S.C. § 1738C (2006); *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943, at \*4 (C.D. Cal. Sept. 28, 2011) (dismissing an equal protection challenge to DOMA because its rationality “ha[d] been decided by *Adams*.”).

<sup>7</sup> Seung Min Kim, *Senate Dems Move to Repeal DOMA*, POLITICO (Nov. 10, 2011), <http://www.politico.com/news/stories/1111/68075.html>; *see, e.g.*, Respect for Marriage Act, S. 598, 112th Cong. (2011); Respect for Marriage Act, H.R. 3567, 111th Cong. (2009); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that DOMA is unconstitutional); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (holding that DOMA is unconstitutional).

Today's validity of the *Adams* decision is best seen in the context of historical developments in the gay rights arena internationally as well as domestically. No country worldwide allowed same-sex unions when *Adams* was decided in 1982.<sup>8</sup> Now, Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden all grant full marriage rights to same-sex couples.<sup>9</sup> Gay rights have also garnered greater attention domestically.<sup>10</sup> Anti-discrimination laws similar to that pioneered by Wisconsin in 1982 had been embraced by another thirteen states and the District of Columbia by 2003.<sup>11</sup> Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia now extend marriage to same-sex couples and another nine states allow civil unions or registered partnerships.<sup>12</sup> At the same time, however, a number

<sup>8</sup> Amy R. Brownstein, *Why Same-sex Spouses Should Be Granted Preferential Immigration Status: Reevaluating Adams v. Howerton*, 16 LOY. L.A. INT'L & COMP. L. REV. 763, 767 (1994).

<sup>9</sup> Emily Alpert, *Gay marriage: Where is it legal?*, L.A. Times (Mar. 26, 2013), <http://www.latimes.com/news/world/worldnow/la-fg-wn-gay-marriage-where-is-it-legal-20130326,0,5848512.story>; *International Progress Toward the Freedom to Marry*, FREEDOM TO MARRY (Dec. 2012), <http://www.freedomtomarry.org/pages/international-progress-toward-the-freedom-to-marry>; Jason Miks, *Same-sex marriage around the world*, CNN (Mar. 25, 2013), <http://globalpublicsquare.blogs.cnn.com/2013/03/25/same-sex-marriage-around-the-world-2/>.

<sup>10</sup> Turner, *supra* note 3, at 91 n.1 (2007); Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 287 (2011). Although Wisconsin was the first state to grant positive anti-discrimination rights to homosexuals, a number of state legislatures and courts had taken steps to at least legalize homosexuality in the preceding decades. See Turner, *supra* note 3, at 92. Illinois was the first state to decriminalize sodomy in 1961 followed by Connecticut in 1969. Nan D. Hunter, *Living With Lawrence*, 88 MINN. L. REV. 1103, 1123 n.111 (2004). Prior to *Adams*, twenty more states repealed their sodomy laws legislatively and two with court involvement. *Sodomy Laws in the United States*, SODOMY LAWS (Nov. 24, 2007), <http://www.glapn.org/sodomylaws/usa/usa.htm>; *Commonwealth v. Bonadio*, 415 A.2d 47, 51 (Pa. 1980) (invalidating Pennsylvania's sodomy law); *People v. Onofre*, 415 N.E.2d 936, 943 (N.Y. 1980) (striking down New York's sodomy law). In the years preceding *Adams*, state courts saw a number of other gay rights challenges though most were unsuccessful. See, e.g., *Inman v. City of Miami*, 197 So. 2d 50, 52 (Fla. Dist. Ct. App. 1967) (rejecting a challenge to Miami's ordinance prohibiting the operation of gay bars); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (rejecting a challenge to a statute limiting marriage to opposite sex couples); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977) (rejecting a teacher's wrongful discharge claim because, as a homosexual, "his ability and fitness to teach was impaired").

<sup>11</sup> *Laws Prohibiting Job Discrimination Based on Sexual Orientation And/Or Gender Identity*, AMERICAN CIVIL LIBERTIES UNION (June 9, 2003), [http://www.aclu.org/lgbt-rights\\_hiv-aids/laws-prohibiting-job-discrimination-based-sexual-orientation-andor-gender-ident](http://www.aclu.org/lgbt-rights_hiv-aids/laws-prohibiting-job-discrimination-based-sexual-orientation-andor-gender-ident). Among the states with job discrimination provisions, some went further to also include "gender identity." See, e.g., MINN. STAT. § 363A.03(44) (2011). By 2012, sixteen states and the District of Columbia had laws prohibiting discrimination on the basis of gender identity or expression. *Non-Discrimination Laws That Include Gender Identity or Expression*, TRANSGENDER LAW & POLICY INSTITUTE (Feb. 17, 2010), <http://www.transgenderlaw.org/ndlaws/index.htm>.

<sup>12</sup> *Same-sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. OF

of states have incorporated provisions similar to DOMA, so-called “mini-DOMAs,” into their own constitutions.<sup>13</sup>

The divide between the states is akin to the tense and often back-and-forth position of the federal government on gay rights

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ST. LEGISLATURES (July 14, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>. Note that only New Hampshire, New York, Vermont, and the District of Columbia legalized same-sex marriages without court involvement. See Forde-Mazrui, *supra* note 10, at 287; Thomas Kaplan, *After Long Wait, Gay Couples Marry in New York*, N.Y. TIMES, July 24, 2011, at A4. Massachusetts, Connecticut, and Iowa legalized same-sex marriage with court compulsion. See Forde-Mazrui, *supra* note 10; Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009). Also, the highest courts of California and Hawaii have ruled in favor of same-sex marriage, but the decisions were later overturned by referenda. Forde-Mazrui, *supra* note 10, at 287–88; In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993).

<sup>13</sup> Mark Strasser, *When Is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 305–06 (2001); see, e.g., ALA. CONST. art. I, § 36.03 (“Marriage is inherently a unique relationship between a man and a woman.”); ALASKA CONST. art. I, § 25 (“[A] marriage may exist only between one man and one woman.”); ARIZ. CONST. art. XXX, § 1 (“Only a union of one man and one woman shall be valid or recognized as a marriage.”); ARK. CONST. amend. LXXXIII, § 1 (“Marriage consists only of the union of one man and one woman.”); CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized.”); COLO. CONST. art. II, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage.”); FLA. CONST. art. I, § 27 (“[M]arriage is the legal union of only one man and one woman.”); GA. CONST. art. I, § 4, ¶ 1 (“This state shall recognize as marriage only the union of man and woman.”); HAW. CONST. art. I, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”); IDAHO CONST. art. III, § 28 (“A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized.”); KAN. CONST. art. XV, § 16 (“Marriage shall be constituted by one man and one woman only.”); KY. CONST. § 233A (“Only a marriage between one man and one woman shall be valid or recognized as a marriage.”); LA. CONST. art. XII, § 15 (“Marriage . . . shall consist only of the union of one man and one woman.”); MICH. CONST. art. I, § 25 (“[T]he union of one man and one woman in marriage shall be the only agreement recognized as a marriage.”); MISS. CONST. art. XIV, § 263A (“Marriage may take place and may be valid . . . only between a man and a woman.”); MO. CONST. art. I, § 33 (“[A] marriage shall exist only between a man and a woman.”); MONT. CONST. art. XIII, § 7 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage.”); NEB. CONST. art. I, § 29 (“Only marriage between a man and a woman shall be valid or recognized.”); NEV. CONST. art. I, § 21 (“Only a marriage between a male and female person shall be recognized and given effect.”); N.D. CONST. art. XI, § 28 (“Marriage consists only of the legal union between a man and a woman.”); OHIO CONST. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in or recognized.”); OKLA. CONST. art. II, § 35 (“Marriage . . . shall consist only of the union of one man and one woman.”); OR. CONST. art. XV, § 5a (“[O]nly a marriage between one man and one woman shall be valid or legally recognized.”); S.C. CONST. art. XVII, § 15 (“A marriage between one man and one woman is the only lawful domestic union.”); S.D. CONST. art. XXI, § 9 (“Only marriage between a man and a woman shall be valid or recognized.”); TENN. CONST. art. XI, § 18 (“The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract.”); TEX. CONST. art. I, § 32 (“Marriage . . . shall consist only of the union of one man and one woman.”); UTAH CONST. art. I, § 29 (“Marriage consists only of the legal union between a man and a woman.”); VA. CONST. art. I, § 15-A (“[O]nly a union between one man and one woman may be a marriage valid in or recognized.”); WIS. CONST. art. XIII, § 13 (“Only a marriage between one man and one woman shall be valid or recognized as a marriage.”).

issues.<sup>14</sup> In 1996, as a reaction to the Hawaiian debate and other advances made by the states, Congress passed the Defense of Marriage Act (DOMA).<sup>15</sup> DOMA set forth that “the word ‘marriage’ means only a legal union between one man and one woman.”<sup>16</sup> While same-sex marriage rights have not been recognized for federal purposes, in a number of instances the federal government has made great strides in support of gay rights.<sup>17</sup> The Immigration Act of 1990 removed homosexuality from the list of grounds for exclusion from immigration to the United States.<sup>18</sup> On October 28, 2009, President Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, a measure which expanded federal hate crime law to include crimes motivated by a victim’s actual or perceived sexual orientation or gender identity.<sup>19</sup> Finally, Don’t Ask Don’t Tell,<sup>20</sup> an official government policy banning openly homosexual citizens from serving in the military, was repealed in 2011.<sup>21</sup>

In its decisions regarding gay rights, the stance of the federal judiciary also reflects inconsistencies similar to those seen among the states and in the uncertain and at times opposing positions of

<sup>14</sup> Perhaps the best example of the erratic position of the federal government is President Obama’s order to the Department of Justice to stop defending DOMA and Congress’s subsequent decision to defend DOMA in court. David G. Savage and James Oliphant, *Obama Administration Shifts Legal Stance on Gay Marriage*, L.A. TIMES (Feb. 23, 2011), <http://articles.latimes.com/2011/feb/23/nation/la-na-obama-gay-marriage-20110224>; see also Adam Liptak, *The President’s Courthouse*, N.Y. TIMES, Feb. 27, 2011, at WK5.

<sup>15</sup> H.R. REP. NO. 104-664, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 2905–23; Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC. CHANGE 53, 68 (2011).

<sup>16</sup> The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006). The law also limited the scope of the Full Faith and Credit Clause by allowing states to decide whether or not to recognize same-sex marriages entered into in other states. *Id.*

<sup>17</sup> *Civil Rights*, WHITE HOUSE, <http://www.whitehouse.gov/issues/civil-rights> (last visited Sept. 8, 2013); Brian J. McGoldrick, *United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?*, 8 GEO. IMMIGR. L.J. 201, 201 (1994); *Asylum Based on Sexual Orientation and Fear of Persecution*, INDIANA UNIVERSITY (2000), <http://www.indiana.edu/~overseas/lesbigay/advise/asylum.html>; Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES, July 22, 2011, at A13.

<sup>18</sup> McGoldrick, *supra* note 17, at 201.

<sup>19</sup> 18 U.S.C. § 249(a)(2); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2190 (Oct. 28, 2009).

<sup>20</sup> 10 U.S.C. § 654 (2006), repealed by Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2011). The policy was introduced under President Clinton in 1993 as a compromise. Robert I. Correales, *Don’t Ask, Don’t Tell: A Dying Policy on the Precipice*, 44 CAL. W. L. REV. 413, 417 (2008). The policy allowed homosexuals who were not open about their sexual orientation to serve in the military. *Id.* at 415. Prior to Don’t Ask, Don’t Tell, homosexuals and bisexuals were not allowed to serve in the military at all. DEP’T OF DEFENSE DIRECTIVE 1332.14 (1993), available at <http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d133214p.pdf>.

<sup>21</sup> 10 U.S.C. § 654.

the federal legislative and executive branches.<sup>22</sup> With specific regard to DOMA, in a 2009 employment dispute resolution hearing, the Ninth Circuit found the law violative of Due Process.<sup>23</sup> In 2010, the United States District Court for the District of Massachusetts invalidated DOMA in two cases as unconstitutional.<sup>24</sup> A bankruptcy court in the Central District of California made a similar finding a year later.<sup>25</sup> Yet, on September 28, 2011, the Federal District Court in the same California district summarily dismissed a bi-national same-sex couple's equal protection challenge to DOMA in *Lui v. Holder*.<sup>26</sup> Curiously, the court seemed to suggest that the question of the 1996 law's validity "ha[d] been decided by *Adams*" in 1982.<sup>27</sup> This summary judgment resolution of an equal protection challenge to DOMA is in the least worrisome. Not only does it suggest that the court did not take into account any developments in international and domestic law and policy concerning gay rights over the past thirty years, it also reminds that *Adams* is good law and in the case that DOMA is repealed without replacement, *Adams* may reenter the field as the leading authority on non-recognition of spousal status of same-sex couples under federal immigration law.<sup>28</sup>

This Note proceeds in four parts and analyzes the validity and applicability of *Adams* today in light of political, social, and judicial developments. Part I describes the history behind the

<sup>22</sup> See, e.g., *Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004) (upholding Florida's bar on adoption by homosexuals); *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011) (upholding Louisiana's refusal to recognize out-of-state adoptions by same-sex couples). But see *Finstuen v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (holding an Oklahoma statute preventing recognition of out-of-state adoptions by same-sex couples unconstitutional); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that DOMA is unconstitutional); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) (holding that DOMA is unconstitutional).

<sup>23</sup> *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009).

<sup>24</sup> *Massachusetts*, 698 F. Supp. 2d at 253 (holding that DOMA exceeds Congress's power under the Spending Clause and violates the Tenth Amendment); *Gill*, 699 F. Supp. 2d at 397 (holding DOMA unconstitutional as violative of equal protection).

<sup>25</sup> *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011) (finding that DOMA violated the debtors' equal protection rights).

<sup>26</sup> *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943, at \*5 (C.D. Cal. Sept. 28, 2011); Andrew Harmon, *Judge Throws Out Binational Couple's DOMA Lawsuit*, THE ADVOCATE (Sept. 29, 2011), [http://www.advocate.com/News/Daily\\_News/2011/09/29/Judge\\_Throws\\_Out\\_Binational\\_Couple\\_s\\_DOMA\\_Suit/](http://www.advocate.com/News/Daily_News/2011/09/29/Judge_Throws_Out_Binational_Couple_s_DOMA_Suit/).

<sup>27</sup> *Lui*, 2011 WL 10653943, at \*4.

<sup>28</sup> There are also a number of cases seeking to invalidate DOMA that have been appealed. See, e.g., *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 1 (1st Cir. 2012) (joining and appealing *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) and *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010)). *Windsor v. U.S.* is currently pending in the Supreme Court. *Windsor v. United States: Eddie Windsor Challenges DOMA*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/lgbt-rights/windsor-v-united-states-thea-edie-doma>.

federal judiciary and legislature's involvement in defining marriage, including *Adams*, DOMA, and the recent challenge in *Lui v. Holder*. Part II then catalogues thirty years of political, social, and judicial changes in the gay rights arena, which may now affect the allegations on which *Adams* and DOMA relied. This Note concludes that in today's political, social, and judicial climate the validity of *Adam's* today is seriously undermined. Part III proposes two solutions that can assist in avoiding a resurrection of *Adams* in later years and help bi-national same-sex couples gain the right to receive spousal status for immigration purposes in accord with current cultural developments.

#### I. FEDERAL MARRIAGE: THE HISTORY OF DEFINING THE TERM "MARRIAGE" FOR PURPOSES OF FEDERAL LAW

The debate about the meaning of the word "marriage" began in the decade preceding *Adams*.<sup>29</sup> With a growing trend to recognize rights traditionally denied to homosexuals, courts around the United States began to see a new kind of equal protection challenge in the 1970s.<sup>30</sup> The era of the gay liberation movement first brought same-sex marriage into the spotlight.<sup>31</sup> As a result of increasing tolerance of the American society, two males were able to obtain a marriage license and sue for federal immigration benefits in *Adams*.<sup>32</sup> The Ninth Circuit did not

<sup>29</sup> H.R. REP. NO. 104-664, at 10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905-23. The "vigorous public debate" on the definition of the term marriage came later with *Baehr v. Lewin*. Cynthia M. Reed, *When Love, Comity, and Justice Conquer Borders: INS Recognition of Same-Sex Marriage*, 28 COLUM. HUM. RTS. L. REV. 97, 109 (1996).

<sup>30</sup> See Brownstein, *supra* note 8, at 767; *see, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). In the early 1970s, gays began to pursue legal acceptance of same-sex marriage. Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s*, 119 YALE L.J. 316, 316 (2009). *Baker* was the first case to challenge the constitutionality of the prohibition of same-sex marriages. Heather Hamilton, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 964 (1998).

<sup>31</sup> *Anti-Homosexual Laws*, WASH. POST, May 31, 1977, at C18; Cynthia Gorney, *District's Gays Gain Power After Shedding Secrecy; District's Gays Add to Power by Subtracting From Secrecy*, WASH. POST, May 23, 1977, at C1; *see also* *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 499-501 (N.Y. Sup. Ct. 1971) (holding that a marriage between two males was a nullity); *Baker*, 191 N.W.2d at 187 (rejecting a challenge to a statute limiting marriage to opposite sex couples); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (holding that two females cannot enter into a marriage or have a marriage license issued to them); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding that a statutory prohibition against same-sex marriages does not violate equal protection).

<sup>32</sup> William Greider, *We're Becoming a More Tolerant Society*, WASH. POST, Nov. 25, 1979, at C1. While *Adams v. Howerton* was not decided until 1982, Adams and Sullivan married in 1975 amidst the gay liberation movement of the 1970s. *Adams v. Howerton*, 673 F.2d 1036, 1043 (9th Cir. 1982); *Adams v. Howerton*, 486 F. Supp. 1119, 1120 (C.D. Cal. 1980). They resided in Los Angeles and read a magazine article that a clerk in Boulder, Colorado, was issuing marriage licenses to same-sex couples. Scott C. Titshaw,

confer those benefits and instead made crystal clear that “marriage” under the Immigration and Nationality Act (INA) meant a union of one man and one woman.<sup>33</sup> The common law governed this understanding until the passage of DOMA in 1996.<sup>34</sup> DOMA brought the holding of *Adams* into the United States Code.<sup>35</sup> Since then, DOMA has been the reason for denying immigration benefits to bi-national, same-sex spouses.<sup>36</sup> This section delineates the story behind *Adams*, charts the reasoning of the district court and the Ninth Circuit in deciding the case, and clarifies Congress’s rationale in enacting DOMA.

#### A. *Adams v. Howerton*<sup>37</sup>

The personal story behind the case started with what ordinarily is a happy moment—a wedding. On April 21, 1975, Sullivan, a male Australian citizen, married Adams, a male citizen of the United States.<sup>38</sup> The couple wed in Colorado and soon after Sullivan applied for adjustment of status to permanent residence based on his classification as an immediate relative of his United States citizen husband.<sup>39</sup> The Immigration and Naturalization Service (INS) denied immigration benefits to Sullivan because he “failed to establish that a bona fide marital relationship can exist between two faggots.”<sup>40</sup> The couple appealed the administrative denial in court.<sup>41</sup>

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*The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 589 (2010). They traveled to Boulder and got married by a minister. *Id.*

<sup>33</sup> *Adams*, 673 F.2d at 1043.

<sup>34</sup> 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006); see generally Strasser, *supra* note 13; see, e.g., *Sullivan v. I.N.S.*, 772 F.2d 609, 611 (relying on *Adams* and affirming that the Board of Immigration Appeals did not abuse its discretion by ordering deportation of a same-sex spouse); *In re Cooper*, 187 A.D.2d 128, 134 (N.Y. App. Div. 2d Dep’t 1993) (relying on *Adams* in holding that prohibiting homosexual partners from electing against decedent’s will as surviving spouse did not violate the constitution).

<sup>35</sup> 1 U.S.C. § 7 (2006) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife”); *Adams*, 486 F. Supp. at 1122 (“[T]he term ‘marriage’ . . . refers to a contract and ceremony involving . . . ‘a man and a woman.’”).

<sup>36</sup> Alicia Caldwell, *Same Sex Couples Denied Immigration Benefits By U.S.*, HUFFINGTON POST (Mar. 30, 2011), [http://www.huffingtonpost.com/2011/03/30/same-sex-couples-denied-i\\_n\\_842646.html](http://www.huffingtonpost.com/2011/03/30/same-sex-couples-denied-i_n_842646.html).

<sup>37</sup> *Adams*, 673 F.2d 1036; *Adams*, 486 F. Supp. 1119.

<sup>38</sup> *Adams*, 486 F. Supp. at 1120; Sullivan was previously married to a woman and granted Permanent Resident Status but his status was revoked as not bona fide. Titshaw, *supra* note 32, at 588–89.

<sup>39</sup> *Adams*, 486 F. Supp. at 1120.

<sup>40</sup> *Id.* at 1121; Titshaw, *supra* note 32, at 588; *Quotes*, A.B.A. J., Aug. 1984, at 33.

<sup>41</sup> Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. C.R. & C.L. 345, 355 (2007).



1. District Court Decision<sup>42</sup>

Perplexed with a lack of definition of the word “spouse,” the court promulgated a rule for determining spousal status for immigration purposes.<sup>43</sup> The court deduced that congressional intent demands that courts look to the law of the place where the marriage was contracted, unless “the state law (or in certain instances the foreign law) is one which offends federal public policy.”<sup>44</sup> In such instance, federal public policy should prevail.<sup>45</sup>

In evaluating the state law element the court refused to brand the union between Adams and Sullivan a “marriage.”<sup>46</sup> First, it reasoned that “‘marriage’ as used throughout Colorado law refers to a contract and ceremony involving . . . ‘a man and a woman.’”<sup>47</sup> Second, “every legal source that [the Judge] examined, starting with Black’s Law Dictionary” supported the same conclusion.<sup>48</sup> Third, a number of states, namely New York,<sup>49</sup> Minnesota,<sup>50</sup> Kentucky,<sup>51</sup> and Washington,<sup>52</sup> in various cases defined marriage as a union of a man and a woman. Lastly, the court pointed out that “no court has yet recognized a union between persons of the same sex as being a legal marriage.”<sup>53</sup> On these grounds, the Court concluded that Adams and Sullivan were not married under Colorado law.<sup>54</sup>

Judge Hill then analyzed the federal public policy exception, particularly the “societal values which underlie the recognition of marriage and the reasons that it has been a preferred and protected legal institution.”<sup>55</sup> Among the societal values crucial to reserving marriage solely for heterosexual couples, the court listed “propagation of the human race,” centuries of scriptural

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<sup>42</sup> *Adams*, 486 F. Supp. at 1119.

<sup>43</sup> *Id.* at 1121–22.

<sup>44</sup> *Id.* at 1122.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* Note that today Colorado allows civil unions for same-sex couples. Dan Frosch, *Colorado Legalizes Civil Unions for Same-Sex Couples*, N.Y. TIMES (Mar. 12, 2013), [http://www.nytimes.com/2013/03/13/us/colorado-legalizes-civil-unions-for-same-sex-couples.html?\\_r=0](http://www.nytimes.com/2013/03/13/us/colorado-legalizes-civil-unions-for-same-sex-couples.html?_r=0).

<sup>48</sup> *Adams*, 486 F. Supp. at 1122.

<sup>49</sup> *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 499–501 (N.Y. Sup. Ct. 1971) (holding that a marriage between two males was a nullity).

<sup>50</sup> *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (rejecting a challenge to a statute limiting marriage to opposite sex couples).

<sup>51</sup> *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. Ct. App. 1973) (holding that two females cannot enter into a marriage or have a marriage license issued to them).

<sup>52</sup> *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding that a statutory prohibition against same-sex marriages does not violate equal protection).

<sup>53</sup> *Adams*, 486 F. Supp. at 1122–23. *Contra Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (upholding validity of same-sex marriages in California).

<sup>54</sup> *Adams*, 486 F. Supp. at 1123.

<sup>55</sup> *Id.*

and canonical teachings, and “vehement condemnation in the scriptures of [Christianity and Judaism] of all homosexual relationships.”<sup>56</sup> For the above reasons, even if Colorado law had recognized Adams and Sullivan’s union as a marriage, federal policy would not grant them spousal status for immigration purposes.<sup>57</sup>

The court then rebutted any arguments that the above rule constituted a denial of the couple’s constitutional rights.<sup>58</sup> It concluded that it served a compelling state interest and was narrowly tailored to that effect.<sup>59</sup> As for the interest, the court pointed to “encouraging and fostering procreation . . . and providing status and stability to the environment in which children are raised.”<sup>60</sup> The court found the restriction of marriage to heterosexual couples to be the least intrusive option narrowly tailored to achieve the above goal.<sup>61</sup> It did so because the one alternative to this end, testing couples for sterility and questioning them regarding their desire to have children, “would themselves raise serious constitutional questions.”<sup>62</sup> With this reasoning the court granted summary judgment for the INS.<sup>63</sup>

## 2. Ninth Circuit Decision<sup>64</sup>

Adams and Sullivan appealed to the Ninth Circuit.<sup>65</sup> The court set out to answer the same questions as the court below.<sup>66</sup> First, whether the term “spouse” in the Immigration and Naturalization Act is limited to heterosexual couples, and second, whether such statutory construction is constitutional.<sup>67</sup> In determining the validity of a marriage for immigration purposes, the court presented a two-step analysis similar to that of the district court.<sup>68</sup> To be recognized for federal immigration purposes, a marriage must be (1) “valid under state law” and (2) “qualif[y] under the [Immigration and Nationality] Act.”<sup>69</sup> The

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<sup>56</sup> *Id.* Christian traditions have played a major role in American jurisprudence and the Bible has been cited in hundreds of decisions. J. Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. ILL. U. L. REV. 187, 187 (1991).

<sup>57</sup> *Adams*, 486 F. Supp. at 1123.

<sup>58</sup> *Id.* at 1124.

<sup>59</sup> *Id.* at 1125.

<sup>60</sup> *Id.* at 1124.

<sup>61</sup> *Id.* at 1125.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

<sup>65</sup> *Id.*; see Francoeur, *supra* note 41, at 355.

<sup>66</sup> See Francoeur, *supra* note 41, at 355.

<sup>67</sup> *Adams*, 673 F.2d at 1038.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

court refused to address the first element.<sup>70</sup>

Instead, it set out to define the intent of Congress to determine whether the marriage qualifies under the Act.<sup>71</sup> It concluded that it does not.<sup>72</sup> First, the court gave deference to the Immigration and Naturalization Service,<sup>73</sup> as the agency charged with the interpretation of the Immigration and Nationality Act, and its interpretation that homosexual marriage does not confer spousal status for immigration purposes.<sup>74</sup> Second, as a matter of statutory construction, the court found that “unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning,” which in this case favored opposite-sex couples.<sup>75</sup> Third, because the 1965 amendment to the INA that added the word spouse also clearly expressed intent to make homosexuality a ground for inadmissibility to the United States, the court concluded that Congress did not intend to confer spousal status on same-sex marriages.<sup>76</sup>

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<sup>70</sup> It has been argued that the court went too far in wanting to define the meaning of marriage for federal immigration purposes since it had good evidence that the first prong of the test was not met under Colorado law. See Titshaw, *supra* note 32, at 590. In fact, the district court even cited an opinion by the Colorado Attorney General stating that same-sex marriages were of no legal effect in Colorado. *Id.*

<sup>71</sup> *Adams*, 673 F.2d at 1039.

<sup>72</sup> *Id.* at 1040.

<sup>73</sup> The Homeland Security Act of 2002 dismantled the Immigration and Naturalization Service. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). On March 1, 2003, the U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Protection (CBP) took over the responsibilities of the INS within the newly created Department of Homeland Security. *Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (May 25, 2011), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/vgnnextoid=e00c0b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=e00c0b89284a3210VgnVCM100000b92ca60aRCRD>.

<sup>74</sup> *Adams*, 673 F.2d at 1040.

<sup>75</sup> *Id.* The court supported its point by reference to Webster's Third New International Dictionary and Black's Law Dictionary and their definition of marriage as between a man and a woman. *Id.* Similar reasoning was used in *Jones v. Hallahan*, 501 S.W. 2d 588, 589 (Ky. 1973) (“[Marriage] must . . . be defined according to common usage.”). *Jones* referred to Webster's New International Dictionary, The Century Dictionary and Encyclopedia, and Black's Law Dictionary. *Id.*

<sup>76</sup> *Adams*, 673 F.2d at 1040–41. The exclusion of homosexuals from immigration has an interesting history. The Immigration and Nationality Act of 1940 denied immigration benefits to those who could not demonstrate good moral character, but it did not specifically include homosexuality. William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy*, *Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 930 (1997). The Immigration and Nationality Act of 1952 (McCarran-Walter Act) prohibited immigration into the United States of those “afflicted with psychopathic personality.” *Id.*; Immigration and Nationality (McCarran-Walter) Act of 1952, Pub. L. No. 82-414, ch. 477, § 212(a)(4), 66 Stat. 163, 182 (repealed 1990). The INS interpreted this language to exclude homosexuals and bisexuals. Eskridge, *supra*, at 930. A number of cases unsuccessfully challenged this interpretation. *Id.* To strengthen the INS interpretation of the law, Congress added “sexual deviation” as a basis for exclusion in 1965. Eskridge, *supra*, at 932. The exclusion of homosexuality was firmly set in place by the Supreme Court in 1967. *Id.*; *Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 123–25 (1967) (holding that homosexuality is covered

The Ninth Circuit then assessed the constitutionality of this interpretation.<sup>77</sup> The court applied rational basis scrutiny because Congress has “almost plenary power to admit or exclude aliens.”<sup>78</sup> It noted that irrationality lies where the interpretation is “so baseless as to be violative of due process” but that “there may be actions of the Congress with respect to aliens that are so essentially political in character as to be nonjusticiable.”<sup>79</sup>

It first analogized the exclusion of same-sex marriages to other close family relationships that Congress did not place into the immediate relative category.<sup>80</sup> Finally, the court reasoned that because “homosexual marriages never produce offspring, . . . they are not recognized in most, if in any, of the states, . . . [and] they violate traditional and often prevailing societal mores,” it was rational for Congress to intend to exclude them from spousal status under the INA.<sup>81</sup> With this reasoning the court affirmed the District Court’s judgment.<sup>82</sup>

#### B. The Defense of Marriage Act<sup>83</sup>

Prior to the passage of DOMA, courts were left to their own logic in delineating the scope of the term “marriage.”<sup>84</sup> *Adams* remained the leading point of reference in defining “marriage” for federal immigration purposes until 1996.<sup>85</sup> A Congressional Report from the same year very well clarified the history

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in the INA under the “psychopathic personality” provision). In later years the situation improved with the INS’s “ingenious don’t ask, don’t tell policy” which stated that “[a]n alien shall not be asked any questions concerning his or her sexual preference during primary inspection.” Eskridge, *supra*, at 937. For those whose homosexuality was known, the INS adopted a policy of routinely granting waivers of excludability. *Id.* at 939. Finally, the Immigration Act of 1990 removed homosexuality as grounds for exclusion from immigration to the United States. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

<sup>77</sup> *Adams*, 673 F.2d at 1041–43.

<sup>78</sup> *Id.* at 1041; *see also* *Galvan v. Press*, 347 U.S. 522, 530 (1954) (“The power of Congress over the admission of aliens and their right to remain is necessarily very broad.”); *Demore v. Kim*, 538 U.S. 510, 511 (2003) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *Boutilier*, 387 U.S. at 123 (“It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”).

<sup>79</sup> *Adams*, 673 F.2d at 1041–43.

<sup>80</sup> *Id.* at 1042. Today the United States Code notes that “the term ‘immediate relatives’ means the children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age.” 8 U.S.C. § 1151(b)(2)(A)(i) (2006).

<sup>81</sup> *Adams*, 673 F.2d at 1042–43.

<sup>82</sup> *Id.* at 1043.

<sup>83</sup> The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

<sup>84</sup> *Titshaw*, *supra* note 32, at 588.

<sup>85</sup> *Strasser*, *supra* note 13, at 270.

surrounding the need for DOMA.<sup>86</sup> On a political level, the law was “a response to a very particular development in the State of Hawaii.”<sup>87</sup> Namely, Congress feared that Hawaii or another state would soon begin issuing marriage licenses to same-sex couples.<sup>88</sup> Such occurrence would likely have had a wide impact since the word “marriage” appeared more than 800 times and the term “spouse” in over 3,100 instances within federal statutes and regulations.<sup>89</sup> Yet, neither of the two words was expressly defined in federal law.<sup>90</sup> In fact, the report noted that “there was never any reason [for Congress] to make explicit what has always been implicit.”<sup>91</sup> The Committee compiling the report noted with certainty that none of the laws “were thought by even a single Member of Congress to refer to same-sex couples.”<sup>92</sup> The House Committee on the Judiciary found it “beyond question” that Congress did not intend to extend the terms “marriage” and “spouse” to same-sex couples.<sup>93</sup> Armed with such strong reasoning, the bill passed Congress and in the late hours of September 21, 1996, President Clinton signed the Defense of Marriage Act into law.<sup>94</sup> In the House Report on DOMA, Congress also identified four areas of governmental interest that DOMA advances.<sup>95</sup>

First, the law advances the interest of “defending and nurturing the institution of traditional heterosexual marriage.”<sup>96</sup> In elaborating on that goal, Congress identified the “ends of marriage.”<sup>97</sup> Accordingly, society has an interest in “encouraging responsible procreation and child-rearing.”<sup>98</sup> It does so through marriage—an institution that “approves and encourages sexual

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<sup>86</sup> H.R. REP. NO. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905–23.

<sup>87</sup> *Id.* at 2.

<sup>88</sup> *Id.* at 4–7. This fear stemmed from tension between the Hawaii Supreme Court and the state legislature. *Id.* The Court sought to extend marriage rights to same-sex couples under the state constitution while the legislature attempted to word and pass a constitutional amendment that would limit marriage to opposite-sex couples and withstand judicial review. *Id.*; *Baehr v. Lewin*, 852 P.2d 44, 54–55 (Haw. 1993).

<sup>89</sup> H.R. REP. NO. 104-664, at 10.

<sup>90</sup> *Id.* The Congressional Report notes “very limited exceptions” where federal law in some way did elaborate on the meaning of the term “spouse.” *Id.*; *see, e.g.*, 29 U.S.C. § 2611(13) (1965) (defining “spouse” for the purposes of family and medical leave as “a husband or wife”). Since the terms “husband” and “wife” are used among same-sex couples, this distinction did not convey any further clarification of the term with respect to same-sex couples.

<sup>91</sup> H.R. REP. NO. 104-664, at 10.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 10 n.35.

<sup>94</sup> 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006); Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.

<sup>95</sup> H.R. REP. NO. 104-664, at 12.

<sup>96</sup> *Id.* at 12.

<sup>97</sup> *Id.* at 13.

<sup>98</sup> *Id.*

intercourse and the birth of children.”<sup>99</sup> This makes marriage a means of signaling to couples that their long-term relationship is “socially important.”<sup>100</sup>

Second, DOMA “defend[s] traditional notions of morality.”<sup>101</sup> Specifically, the law “reflect[s] and honor[s] a collective moral judgment about human sexuality.”<sup>102</sup> Congress noted that there are two components to this moral judgment—“disapproval of homosexuality” and a “conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”<sup>103</sup> Congress found it “entirely appropriate” to make such judgment to protect “immoral” conduct from trivializing and demeaning traditional marriage.<sup>104</sup>

Third, DOMA “protect[s] state sovereignty and democratic self-governance.”<sup>105</sup> Mimicking the tension between the state legislature and the state judiciary in Hawaii, the House Report voices fear that judicial control over the matter of marriage diminishes democratic self-governance.<sup>106</sup> The report argues that it should be the legislature that “preserve[s] the will of the people” not the courts.<sup>107</sup>

Fourth, DOMA “preserve[s] scarce government resources.”<sup>108</sup> Simply put, the federal government expressed a concern that the recognition of same-sex marriages would create “certain fiscal obligations” by means of having to pay federal benefits to same-sex spouses.<sup>109</sup>

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<sup>99</sup> *Id.* at 14.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 12.

<sup>102</sup> *Id.* at 15.

<sup>103</sup> *Id.* at 16; *see also* Medina, *supra* note 56.

<sup>104</sup> H.R. REP. NO. 104-664, at 16. Morality arguments have often been made in older court cases with reference to homosexuality. *See, e.g.*, Gaylord v. Tacoma Sch. Dist. No. 10, 559 P.2d 1340, 1345 (Wash. 1977) (“Homosexuality is widely condemned as immoral and was so condemned as immoral during biblical times.”); Norton v. Macy, 417 F.2d 1161, 1165 n.18 (D.C. Cir. 1974) (“Homosexual conduct is commonly considered as ‘immoral’ under the prevailing mores of our society.”). Although infrequently, such arguments are still occasionally seen in judicial opinions. *See, e.g.*, Ex Parte H.H., 830 So. 2d 21, 28 (Ala. 2002) (Moore, J., concurring) (“The Courts of Alabama should continue to recognize that a homosexual lifestyle is ‘illegal under the laws of this state and immoral in the eyes of most of its citizens.’”).

<sup>105</sup> H.R. REP. NO. 104-664, at 12.

<sup>106</sup> *Id.* at 16.

<sup>107</sup> *Id.* at 17.

<sup>108</sup> *Id.* at 12.

<sup>109</sup> *Id.* at 18. While conservative voices think that it “would cost the government too much money if same-sex couples had access to Social Security,” there are no reliable numbers available. *Repeal of DOMA Passes Senate Judiciary Committee*, WASH. INDEP. (Nov. 10, 2011), <http://washingtonindependent.com/115804/repeal-of-doma-passes-senate-judiciary-committee>; Andrew Harmon, *A Major Milestone? DOMA Repeal Advances in the Senate*, ADVOCATE (Nov. 11, 2011), [http://www.advocate.com/News/Daily\\_News/2011/11/10/Senate\\_Committee\\_to\\_Vote\\_on\\_DOMA\\_Repeal\\_Bill/](http://www.advocate.com/News/Daily_News/2011/11/10/Senate_Committee_to_Vote_on_DOMA_Repeal_Bill/). Note also the immeasurable

With the above justification, DOMA officially limited the reach of the term “marriage” under federal law to opposite-sex couples.<sup>110</sup> Since then, in a number of instances members of Congress have attempted to repeal DOMA.<sup>111</sup> Recently, the law has created a divide between the executive branch and the federal legislature.<sup>112</sup> Today, the Department of Justice no longer defends DOMA in courts.<sup>113</sup> While the statute remains in effect, it raises serious questions of constitutional law.<sup>114</sup>

### C. *Lui v. Holder*<sup>115</sup>

Lui and Roberts are a same-sex couple. Lui, a citizen of Indonesia, married Roberts, a United States citizen, in Massachusetts<sup>116</sup> in 2009.<sup>117</sup> Roberts filed a petition with the U.S.

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costs imposed upon the same-sex spouses who cannot take advantage of “some 1,100 federal benefits, ranging from filing joint tax returns to qualifying for side-by-side burial in a US military cemetery.” Warren Richey, *Senate hearing chronicles costs of DOMA: lost dignity, financial ruin*, CHRISTIAN SCI. MONITOR (July 20, 2011), <http://www.csmonitor.com/USA/Politics/2011/0720/Senate-hearing-chronicles-costs-of-DOMA-lost-dignity-financial-ruin>.

<sup>110</sup> The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

<sup>111</sup> Respect for Marriage Act, S. 598, 112th Cong. (2011); Respect for Marriage Act, H.R. 3567, 111th Cong. (2009). The most recent initiative, Senate Bill 598 proposed by Diane Feinstein, successfully passed the Senate Judiciary Committee on November 10, 2011. Paul Guequierre, *Senate Judiciary Committee Approves Bill Repealing Discriminatory Defense of Marriage Act*, HUMAN RIGHTS CAMPAIGN BLOG (Nov. 10, 2011), <http://www.hrc.org/blog/entry/senate-judiciary-committee-approves-bill-repealing-doma>. President Obama supports the above bill. David Nakamura, *Obama Backs Bill to Repeal Defense of Marriage Act*, WASH. POST (July 19, 2011), [http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI\\_story.html](http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI_story.html). Note Senator Feinstein’s curious history. When serving as the Mayor of San Francisco she had to apologize for anti-gay remarks and in fact vetoed a domestic partnership bill passed by the San Francisco Board of Supervisor in 1982 because she found something that “mimics a marriage license” unacceptable. See Eskridge, *supra* note 76, at 946.

<sup>112</sup> Robert J. Delahunty, *The Obama Administration’s Decisions to Enforce, but Not Defend, DOMA § 3*, 106 NW. U. L. REV. COLLOQUY 69, 69 (2011); Michelle Garcia, *81 Reps Condemn Obama’s DOMA Stance*, THE ADVOCATE (Mar. 15, 2011), <http://www.advocate.com/News/Daily-News/2011/03/15/81-Reps-Condemn-Obamas-DOM-A-Stance/>.

<sup>113</sup> See Delahunty, *supra* note 112, at 69. On February 23, 2011, in a letter to Congress, Attorney General Eric Holder wrote that “the President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.” *Id.*

<sup>114</sup> Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 936 (2010). A minority of scholars believe that DOMA is fully constitutional. Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 974 (2010).

<sup>115</sup> *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943 (C.D. Cal. Sept. 28, 2011).

<sup>116</sup> Massachusetts began issuing marriage licenses to same-sex couples on May 17, 2004, as a result of a decision by the state’s Supreme Court. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16. At that time,

Citizenship and Immigration Services (USCIS) to classify Lui as an immediate relative.<sup>118</sup> Following a denial of the petition and a dismissal of their appeal, the plaintiffs filed suit in the United States District Court for the Central District of California.<sup>119</sup> The couple alleged discrimination in violation of the INA's anti-discrimination provision and challenged DOMA's definition of "marriage" on equal protection grounds.<sup>120</sup> The Service responded with a partial 12(b)(6) motion seeking to dismiss the plaintiffs' first claim.<sup>121</sup> The Bipartisan Legal Advisory Group for the U.S. House of Representatives<sup>122</sup> intervened and moved to dismiss the DOMA claim.<sup>123</sup>

The court granted both summary judgment motions.<sup>124</sup> With respect to the constitutional challenge to DOMA, the court reasoned that this issue had been settled in *Adams*.<sup>125</sup> The court found *Adams* binding because the definition of "marriage" in that case and in DOMA were the same.<sup>126</sup> Although the plaintiff made it clear to the tribunal that much has changed since *Adams* was decided, the court expressly declined to critique *Adams*'s reasoning.<sup>127</sup> It ultimately concluded that *Adams* resolved

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out-of-state residents were unable to obtain marriage licenses in the state. The Honorable Roderick L. Ireland, *In Goodridge's Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 N.Y.U. L. REV. 1417, 1428 (2010). A 1913 law prohibited those who could not marry in their own state to contract a marriage in Massachusetts. *Id.* at 1427. Following an unsuccessful legal challenge to the law in 2006, the legislature repealed the discriminatory statute in 2008. *Id.* at 1429; *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623, 631 (Mass. 2006); 2008 Mass. Acts ch. 216 §§ 1–2 (repealing MASS. GEN. LAWS ch. 207, §§ 11–13, 50).

<sup>117</sup> *Lui*, 2011 WL 10653943, at \*2.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*; 1 U.S.C. § 7 (2006).

<sup>121</sup> *Lui*, 2011 WL 10653943, at \*1.

<sup>122</sup> Following President Obama's refusal to defend DOMA in court, the House of Representatives stepped in to defend the law in courts. Jennifer Steinhauer, *House Republicans Step in to Defend Marriage Act and Dodge a Party Debate*, N.Y. TIMES, Mar. 5, 2011, at A16; Brian Brown, *Gay Marriage and Obama's End Run Around Democracy*, WASH. POST, Feb. 24, 2011, at A17. The Bipartisan Legal Advisory Group voted along party lines to initiate this action to defend DOMA and hired the law firm of King & Spalding and specifically one of its partners, former solicitor general Paul Clement, to lead the litigation team. Nancy Pelosi, *Pelosi Statement After Bipartisan Legal Advisory Group Vote on DOMA* (Mar. 9, 2011), available at <http://pelosi.house.gov/news/press-releases/2011/03/pelosi-statement-after-bipartisan-legal-advisory-group-vote-on-doma.shtm>; Sandhya Somashekhar, *Firm Defending Defense of Marriage Act Withdraws from Case*, WASH. POST, Apr. 25, 2011, at A2. After criticism from gay rights groups, King & Spalding withdrew from the representation. *Id.* Paul Clement resigned from King & Spalding and brought the case to Bancroft, PLLC. *Id.*

<sup>123</sup> *Lui*, 2011 WL 10653943, at \*1.

<sup>124</sup> *Id.* at \*5.

<sup>125</sup> *Id.* at \*4.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*; Defendants' Opposition to Bipartisan Legal Advisory Group's Motion to Dismiss, at \*5–6 n.7, *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx) (C.D. Cal. Sept. 26, 2011).



“Congress’s decision to confer spouse status . . . only upon the parties to heterosexual marriages has a rational basis.”<sup>128</sup> On that ground, the court summarily dismissed the case.<sup>129</sup>

## II. POLITICAL, SOCIAL, AND JUDICIAL DEVELOPMENTS OF THE PAST THIRTY YEARS UNDERMINE THE REASONING BEHIND *ADAMS* AND DOMA

Judge Stephen Wilson declined to address the reasoning of *Adams* when he justified the dismissal of *Lui* with the *Adams* precedent. However, to truly understand the validity of *Adams* and DOMA today, this Note evaluates each of the pillars of the *Adams* decision and Congress’s reasoning behind enacting DOMA in light of political, social, and judicial developments of the past thirty years.

### A. Political Developments (1982–Present)

The Congressional Report attached to DOMA clearly based part of its reasoning on the fact that “same-sex marriage is allowed in no country . . . in the world.”<sup>130</sup> The same held true in 1982 when *Adams* was decided.<sup>131</sup> Today, same-sex marriages are legal in Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden.<sup>132</sup> Additionally, a number of countries around the world allow civil unions and registered partnerships, a development that did not occur until 1989 when Denmark became the first country to legalize same-sex unions.<sup>133</sup>

Big changes have also occurred domestically.<sup>134</sup> The court in *Adams* justified its decision in part by the fact that in 1982 same-sex marriages were “not recognized in most, if in any, of the states.”<sup>135</sup> The supporters of DOMA provided similar reasoning in noting that “[n]o State now or at any time in American history has permitted same-sex couples to enter into the institution of marriage.”<sup>136</sup> Today, Connecticut,<sup>137</sup> Iowa,<sup>138</sup> Massachusetts,<sup>139</sup>

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<sup>128</sup> *Lui*, 2011 WL 10653943, at \*4.

<sup>129</sup> *Id.* at \*5.

<sup>130</sup> H.R. REP. NO. 104-664, at 3 n.1 (1996), reprinted in 1996 U.S.C.C.A.N. 2905–23.

<sup>131</sup> Brownstein, *supra* note 8, at 767.

<sup>132</sup> *Same-sex marriage around the world: From criminal prosecutions to legal unions*, CBC NEWS (May 29, 2009), <http://www.cbc.ca/news/world/story/2009/05/26/f-same-sex-timeline.html>.

<sup>133</sup> Brownstein, *supra* note 8, at 767; see, e.g., *Activities in other countries: Albania, Brazil, Czech Republic, and England*, RELIGIOUS TOLERANCE (June 29, 2010), [http://www.religioustolerance.org/hom\\_mary.htm](http://www.religioustolerance.org/hom_mary.htm).

<sup>134</sup> Brownstein, *supra* note 8, at 763.

<sup>135</sup> *Adams v. Howerton*, 673 F.2d 1036, 1041–43 (9th Cir. 1982).

<sup>136</sup> H.R. REP. NO. 104-664, at 3 (1996), reprinted in 1996 U.S.C.C.A.N. 2905–23.

<sup>137</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008) (holding

New Hampshire,<sup>140</sup> New York,<sup>141</sup> Vermont,<sup>142</sup> and the District of Columbia<sup>143</sup> perform same-sex marriages.<sup>144</sup> Maryland does not perform same-sex marriages but, as opined by the Maryland Attorney General, extends the applicability of the Full Faith and Credit Clause to marriages performed elsewhere.<sup>145</sup> The first civil

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that restriction of marriage rights to opposite-sex couples violated same-sex couples' state constitutional rights). In 2009, the Connecticut legislature scratched the old marriage law that had been invalidated by the court and replaced it with a gender-neutral counterpart. Chase Matthews, *Connecticut Gov. signs gay marriage into law*, CHICAGO PRIDE (Apr. 23, 2009), <http://chicago.gopride.com/news/article.cfm/articleid/7272400>. Today, the Connecticut statute, besides age limitations, prohibits marriage only between a person and his or her parent, grandparent, child, grandchild, sibling, parent's sibling, sibling's child, stepparent, or stepchild. CONN. GEN. STAT. § 46b-21 (2009).

<sup>138</sup> *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (requiring statutory language banning same-sex marriage to be stricken). Iowa began issuing marriage licenses to same-sex couples on April 27, 2009. Monica Davey, *A Quiet Day in Iowa as the State Begins Allowing Same-Sex Couples to Marry*, N.Y. TIMES, Apr. 28, 2009, at A12.

<sup>139</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (validating same-sex marriages in Massachusetts).

<sup>140</sup> N.H. REV. STAT. ANN. § 457:1-a (2009). The law today states that "[m]arriage is the legally recognized union of 2 people" and "[a]ny person . . . may marry any other eligible person regardless of gender." *Id.* Governor John Lynch signed the law on June 3, 2009. Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19.

<sup>141</sup> N.Y. DOM. REL. LAW § 10-a (McKinney 2011). New York began issuing marriage licenses to same-sex couples in July 2011 and is the most recent state to legalize same-sex marriage. Michael Barbaro & Nicholas Confessore, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

<sup>142</sup> In 1999, the Supreme Court of Vermont ruled that "exclusion of same-sex couples from the benefits incident to a civil marriage" is violative of the state constitution. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). On July 1, 2000, Vermont became the first state to grant civil unions to same-sex couples with the same legal rights and responsibilities of marriage. *Exchanging of Vows by Gays in Vermont*, N.Y. TIMES, July 2, 2000, at 10. Years later, in a heated exchange between the Vermont legislature and the state's Governor, the state legislature overruled the Governor's veto of a bill legalizing same-sex marriage. *Triumph for Equality*, WASH. POST, Apr. 8, 2009, at A16. In 2009, Vermont then became "the first state to legally recognize gay marriage through a legislative act rather than a court order." *Id.* Interestingly, legislators in the District of Columbia voted to recognize gay marriage performed elsewhere on the same day. *Id.*

<sup>143</sup> D.C. CODE § 46-401 (2010). The statute reads that "[m]arriage is the legally recognized union of 2 persons" and "[a]ny person may enter into a marriage in the District of Columbia with another person, regardless of gender." *Id.* Another major victory came in the months following the passage of the same-sex marriage law. On July 15, 2010, the District of Columbia Court of Appeals held that allowing an initiative seeking to define marriage as between a man and a woman to be put on a ballot would violate the District of Columbia Human Rights Act. *Jackson v. D.C. Bd. of Elections and Ethics*, 999 A.2d 89, 120 (D.C. 2010); *Victory for Gay Marriage in D.C.*, THE ADVOCATE (July 15, 2010), [http://www.advocate.com/News/Daily\\_News/2010/07/15/Victory\\_for\\_Gay\\_Marriage\\_in\\_DC/](http://www.advocate.com/News/Daily_News/2010/07/15/Victory_for_Gay_Marriage_in_DC/).

<sup>144</sup> *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 21, 2011), <http://www.ncsl.org/default.aspx?tabid=16430>.

<sup>145</sup> The Honorable Richard S. Madaleno, Jr., *Marriage — Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland*, OFF. OF THE ATT'Y GEN. (Feb. 23, 2010), <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>. While Maryland's recognition of out-of-state, same-sex marriage is not black letter law, the advisory opinion of the Attorney General has been given credence by courts. Don Aines, *Judge: Woman doesn't have to testify against same-sex spouse*, HERALD-

union laws in the United States also did not appear until the previous decade.<sup>146</sup> With the addition of Hawaii and Delaware on January 1, 2012, eleven states now recognize civil unions or registered partnerships.<sup>147</sup> Besides same-sex marriage and civil union laws, since 1982, states have passed a number of other bills granting additional rights to homosexuals.<sup>148</sup> For example, as of 2012, sixteen states, the District of Columbia, and 143 cities and counties had passed positive anti-discrimination statutes that not only provide protection from discrimination based on sexual orientation but also gender identity.<sup>149</sup>

The federal government's view of homosexuality has also changed in ways that were unthought-of in 1982.<sup>150</sup> After many decades, homosexuality was removed as a basis for exclusion from immigration in 1990.<sup>151</sup> Persecution on account of sexual orientation has been officially recognized as grounds for asylum in the United States since 1994.<sup>152</sup> The discriminatory Don't Ask, Don't Tell military policy was finally repealed in 2011.<sup>153</sup> Today, the Department of Justice no longer defends DOMA in courts because of the President's view that the law is unconstitutional.<sup>154</sup>

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MAIL (June 23, 2011), <http://www.herald-mail.com/news/local/hm-judge-rules-that-samesex-spouse-can-invoke-spousal-privilege-20110623,0,3777097.story>.

<sup>146</sup> Ann Laquer Estin, *Golden Anniversary Reflections: Changes in Marriage After Fifty Years*, 42 FAM. L.Q. 333, 347 (2008). Vermont was the first state to begin granting civil unions in 2000. *Id.*

<sup>147</sup> *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 21, 2013), <http://www.ncsl.org/default.aspx?tabid=16430>. As of March 2013, nine states and the District of Columbia offer marriage licenses to same-sex couples and five states "allow" civil unions. *Id.* Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia authorize same-sex marriages. *Id.* Delaware, Hawaii, Illinois, New Jersey, and Rhode Island allow civil unions which "[provide] state-level spousal rights to same-sex couples." *Id.* California, Nevada, Oregon, and Washington "grant[] nearly all state-level spousal rights to unmarried couples." *Id.*

<sup>148</sup> *Non-Discrimination Laws that include gender identity and expression*, TRANSGENDER L. & POL'Y INST. (Feb. 17, 2010), <http://www.transgenderlaw.org/ndlaws/index.htm>

<sup>149</sup> *Id.*; see, e.g., MINN. STAT. § 363A.03(44) (2011).

<sup>150</sup> See Brownstein, *supra* note 8, at 767.

<sup>151</sup> See Immigration Act of 1990, PL 101-649, 104 Stat 4978 (1990); see, e.g., Samuel M. Silvers, *The Exclusion and Expulsion of Homosexual Aliens*, 15 COLUM. HUM. RTS. L. REV. 295, 295 (1984); Jorge L. Carro, *From Constitutional Psychopathic Inferiority to AIDS: What Is the Future for Homosexual Aliens*, 7 YALE L. & POL'Y REV. 201, 201 (1989).

<sup>152</sup> *Asylum Based on Sexual Orientation And Fear of Persecution*, INDIANA U. (2000), <http://www.indiana.edu/~overseas/lesbigay/advise/asylum.html>.

<sup>153</sup> 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2011). James Dao, *Don't Ask, Don't Tell Ends This Week With Celebrations, Revelations and Questions*, (Sept. 19, 2011, 7:00AM), <http://atwar.blogs.nytimes.com/2011/09/19/dont-ask-dont-tell-ends-this-week-with-celebrations-revelations-and-questions/>.

<sup>154</sup> See Delahunty, *supra* note 112, at 69. In the immigration context, the USCIS has also shown signs of trying to find ways to accommodate same-sex couples while

The international and domestic political changes charted above show how different the political climate is today from what it was in 1982 and 1996. For those same reasons, it is questionable why the *Lui* court so stringently held onto *Adams*—a decision from an era when same-sex marriages were merely a wish of many and the concept of civil unions was yet to materialize.

#### B. Social Developments (1982–Present)

The following section juxtaposes major social developments of the past three decades to the reasoning of the *Adams* court and that of Congress in enacting DOMA. It begins with the concept of social mores, the developments in the customary meaning of the words “marriage” and “spouse,” and ends with the meaning and importance of procreation for today’s society.

##### 1. Social Mores

The *Adams* decisions, as well as Congress in passing DOMA, relied on arguments that take into account social mores.<sup>155</sup> The fundamental cornerstones of that reasoning no longer hold true today. The Ninth Circuit specifically based its reasoning on the fact that same-sex marriages “violate traditional and often prevailing societal mores.”<sup>156</sup> In fact, the district court in *Adams* was wise to point out the “vehement condemnation in the scriptures of [Christianity and Judaism] of all homosexual relationships.”<sup>157</sup> Similarly, the House Committee also pointed out its “conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”<sup>158</sup> There is little doubt that heterosexual marriages are truly more “traditional” in the sense that they have been around for centuries.<sup>159</sup> Yet, what may have a long history, as does discrimination against blacks in the United States, or is sanctioned in the Bible or Torah, such as mandating levirate marriage, is not necessarily a prevailing societal more today.<sup>160</sup>

Research shows that homosexuality is accepted by a majority

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DOMA is being litigated in court. Julia Preston, *Confusion Over Policy on Married Gay Immigrants*, N.Y. TIMES, Mar. 30, 2011, at A14. One of the debated options was delaying decisions on immigrant visa petitions filed by same-sex spouses. *Id.*

<sup>155</sup> *Adams v. Howerton*, 673 F.2d 1036, 1042–43 (9th Cir. 1982); H.R. REP. NO. 104-664, at 15–16 (1996), reprinted in 1996 U.S.C.C.A.N. 2905–23.

<sup>156</sup> *Adams*, 673 F.2d. at 1043.

<sup>157</sup> *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980).

<sup>158</sup> H.R. REP. NO. 104-664, at 16; see also Medina, *supra* note 56, at 191.

<sup>159</sup> See *Adams*, 673 F.2d at 1042–43.

<sup>160</sup> *Deuteronomy* 25:5–6; *Genesis* 38:8; Marcia Johnson, *The Systematic Denial of the Right to Vote to America’s Minorities*, 11 HARV. BLACK LETTER L.J. 61, 62 (1994).

of the society in the United States.<sup>161</sup> In 2007, the media released a poll pointing out that “since 1977 public support of legalization of ‘homosexual relations between consenting adults’ has risen from 43% to a record-breaking 59%.”<sup>162</sup> On the same note, Gallup’s opinion poll from May 2010 shows that 62% of men and 59% of women between the ages of eighteen and forty-nine call gay relations “morally acceptable.”<sup>163</sup> “The number [of those] who report[] having a gay friend or close acquaintance rose from 22% in 1985 to 56% in 2000.”<sup>164</sup> As to legalizing gay marriage, Gallup reports that public support “is near record highs.”<sup>165</sup> As an alternative to gay marriage, the support for civil unions has also grown rapidly.<sup>166</sup> Pew Research Center reported that 49% of Americans supported civil unions in 2004 and 57% in 2009.<sup>167</sup>

## 2. Customary Meaning of the Word “Marriage”

Aside from changed societal mores, the world today also does not view the words “marriage” and “spouse” in the same way as it did a couple of decades ago.<sup>168</sup> *Adams*’s point that the word “spouse” refers to only opposite-sex couples because of its “ordinary, contemporary, common meaning” is no longer valid on at least two grounds.<sup>169</sup> First, as described above, the concept of civil unions and registered partnerships was practically unknown at the time. Accordingly, the *Adams* court would have been unable to extend the definition of “spouse” to any such concept.<sup>170</sup>

<sup>161</sup> Elizabeth O’Brien & John-Henry Westen, *Gallup Pole Shows Highest-Ever Acceptance of Homosexuality in America*, LIFE SITE NEWS (May 30, 2007), <http://www.lifesitenews.com/news/archive/ldn/2007/may/07053003>. In fact, even among white evangelical Christians eighteen to twenty-nine years of age, 58% “support at least some legal recognition of same-sex couples.” Koppelman, *supra* note 114, at 942–43.

<sup>162</sup> Elizabeth O’Brien & John-Henry Westen, *Gallup Pole Shows Highest-Ever Acceptance of Homosexuality in America*, LIFE SITE NEWS (May 30, 2007), <http://www.lifesitenews.com/news/archive/ldn/2007/may/07053003>.

<sup>163</sup> Lydia Saad, *American’s Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP (May 25, 2010), <http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx>.

<sup>164</sup> Koppelman, *supra* note 114, at 940.

<sup>165</sup> Saad, *supra* note 163.

<sup>166</sup> *Majority Continues to Support Civil Unions*, PEW RES. CENTER (Oct. 9, 2009), <http://www.people-press.org/2009/10/09/majority-continues-to-support-civil-unions/>.

<sup>167</sup> *Id.*

<sup>168</sup> Robert George, Sherif Girgis & Ryan T. Anderson, *What Is Marriage?*, CATHOLIC EDUC. RESOURCE CENTER (2010), <http://www.catholiceducation.org/articles/marriage/mf0139.htm>. There are at least two generally accepted competing views on the definition of the term “marriage.” *Id.* First, the conjugal view which states that “[m]arriage is the union of a man and a woman who make a permanent and exclusive commitment to each other of the type that is naturally (inherently) fulfilled by bearing and rearing children together.” *Id.* Second, the revisionist view which makes marriage “the union of two people (whether of the same sex or of opposite sexes) who commit to romantically loving and caring for each other and to sharing the burdens and benefits of domestic life.” *Id.*

<sup>169</sup> *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982).

<sup>170</sup> See Laquer Estin, *supra* note 146, at 346–47.

Second, not even the sources the court relied on support the same conclusion today.<sup>171</sup> The court referred specifically to Webster's Dictionary and Black's Law Dictionary.<sup>172</sup> The House Committee on the Judiciary likewise referred to Black's Law Dictionary in justifying DOMA in 1996.<sup>173</sup> Webster's Dictionary has since expressly added that marriage can mean "the state of being united to a person of the same sex."<sup>174</sup> Black's Law Dictionary defines marriage as a "legal union of a couple" and does not make any distinction between same- and opposite-sex couples.<sup>175</sup> This development strongly suggests that at least factually the reasoning of the *Adams* court and that of the House Committee on the Judiciary in supporting DOMA is inapplicable today.

### 3. Procreation

The last major social argument advanced in the reasoning of the *Adams* court and Congress deals with procreation.<sup>176</sup> Both the district court and the Ninth Circuit in *Adams* based their decisions, at least in part, on the importance of childrearing.<sup>177</sup> The district court pointed to a federal policy of "fostering procreation of the race . . . [and] providing status and stability to the environment in which children are raised."<sup>178</sup> The circuit court took issue with the fact that "homosexual marriages never produce offspring."<sup>179</sup> Little over a decade later, the House

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<sup>171</sup> *Adams*, 673 F.2d at 1040.

<sup>172</sup> *Id.*

<sup>173</sup> H.R. REP. NO. 104-664, at 29 (1996), reprinted in 1996 U.S.C.C.A.N. 2905-23. Note that also *Jones v. Hallahan* relied on various dictionaries in defining "marriage." 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) (referring to Webster's New International Dictionary, The Century Dictionary and Encyclopedia, and Black's Law Dictionary).

<sup>174</sup> MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 425 (11th ed. 2008), available at <http://www.merriam-webster.com/dictionary/marriage>.

<sup>175</sup> BLACK'S LAW DICTIONARY 532 (9th ed. 2009).

<sup>176</sup> *Adams*, 673 F.2d at 1043; H.R. REP. NO. 104-664, at 13. In fact, "[o]ne of the primary arguments that states (and the amicus curiae briefs filed in their support) have made in defense of withholding legal recognition from relationships between same-sex couples involves procreation." Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 403 (2009). This argument needs to be distinguished from arguments hinting at today's "enormous social interests in responsible procreation" advanced by some scholars. See, e.g., Wardle, *supra* note 114, at 300 (emphasis added). This comment does not take on the issue of whether heterosexual parents are more responsible in bringing children into the world than homosexual couples. It is only worth noting that according to the Center for Disease Control and Prevention, even after a decline, U.S. teen births are "highest of all industrialized countries." *Teen Birth Rates Declined Again in 2009*, CENTER FOR DISEASE CONTROL AND PREVENTION (July 1, 2011), <http://www.cdc.gov/features/dsteenpregnancy/>.

<sup>177</sup> *Adams*, 673 F.2d at 1043 (noting that "homosexual marriages never produce offspring"); *Adams v. Howerton* 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) ("[T]he main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race.").

<sup>178</sup> *Adams*, 486 F. Supp. at 1124.

<sup>179</sup> *Adams*, 673 F.2d at 1043.

Committee also noted that the institution of marriage “encourages sexual intercourse and the birth of children.”<sup>180</sup>

The rationality of promoting human propagation and production of offspring by not recognizing same-sex marriages and not granting immigration benefits to same-sex couples is at best questionable.<sup>181</sup> First, many heterosexual individuals who cannot have children are allowed to marry.<sup>182</sup> Second, with technological advances, many same-sex couples produce offspring in today’s “gayby boom.”<sup>183</sup> Third, it is doubtful that gay individuals will enter into heterosexual relationships and procreate in order to propagate the human race in the event that same-sex marriages are not recognized.<sup>184</sup> By the same token, it is unlikely that heterosexual couples will procreate less if same-sex marriage is recognized for immigration purposes.<sup>185</sup> As it was amply put by Daniel Foley, one of the attorneys involved in the suit against Hawaii’s same-sex ban, “[y]ou’ll have marriage, the sky won’t fall, straight people will still procreate, and the race will not become extinct.”<sup>186</sup> Even if the *Adams* court or the 1996 Congress believed otherwise, such justifications appear less and less likely to pass even the rational basis test today.

Another development that undermines the above mentioned procreation argument is rising world population. In 1980, when the district court decided *Adams*, there were fewer than 4.5

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<sup>180</sup> H.R. REP. NO. 104-664, at 14.

<sup>181</sup> See Stein, *supra* note 176, at 435.

<sup>182</sup> In a number of jurisdictions there are special marriage laws for couples that cannot procreate. Stein, *supra* note 176, at 413. “Wisconsin, for example, allows first cousins to marry if the woman is over fifty-five or if either party to the marriage is sterile.” *Id.*

<sup>183</sup> Stein, *supra* note 176, at 414; John Blake, ‘Gayby boom’: Children of gay couples speak out, CNN (June 28, 2009), [http://articles.cnn.com/2009-06-28/living/gayby\\_1\\_same-sex-couples-lesbian-parents?\\_s=PM:LIVING](http://articles.cnn.com/2009-06-28/living/gayby_1_same-sex-couples-lesbian-parents?_s=PM:LIVING).

<sup>184</sup> Joy S. Whitman, Harriet L. Glosoff, Michael M. Kocet & Vilia Tarvydas, *Exploring ethical issues related to conversion or reparative therapy*, AM. COUNSELING ASS’N (May 14, 2006), <http://ct.counseling.org/2006/05/exploring-ethical-issues-related-to-conversion-or-reparative-therapy/>. The American Counseling Association does “not endorse” reparative therapy as a viable treatment option. *Id.* In fact, such therapy has been recognized to be potentially harmful. *Id.* Sandra Boodman, *Vowing to Set the World Straight: Proponents of Reparative Therapy Say They Can Help Gay Patients Become Heterosexual, Experts Call That a Prescription for Harm*, WASH. POST, Aug. 16, 2005, at F01. See also *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (“[T]his court cannot discern a means by which the federal government’s denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex.”).

<sup>185</sup> John Gallagher, *Last Minute Marriage Preparations: Will Hawaii Be Ringing its Wedding Bells for Gay Marriages this Year?*, THE ADVOCATE, Nov. 25, 1997, at 38, available at [http://www.thefreelibrary.com/\\_/print/PrintArticle.aspx?id=20013292](http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=20013292).

<sup>186</sup> *Id.*

billion people living in the world.<sup>187</sup> In 1996, when Congress enacted DOMA, there were over 5.7 billion people alive.<sup>188</sup> Today, according to the United Nations, over 7 billion people share the planet.<sup>189</sup> With respect to the United States population, the U.S. Census Bureau reported a population of about 227 million in 1980.<sup>190</sup> This number has grown to over 312 million by 2012.<sup>191</sup> According to *Adams* the human race was not propagating enough thirty years ago.<sup>192</sup> The same reasoning was raised when DOMA was signed into law in 1996.<sup>193</sup> Today, from the court's dismissal of *Lui v. Holder*,<sup>194</sup> it appears that for the Central District of California Homo sapiens will never procreate enough. Surely, a point will come when this rapid procreation will no longer remain in our interest.<sup>195</sup>

Even more worrisome is the district court's approach. Besides procreation, the court held that not recognizing same-sex marriage for immigration purposes is not only rationally related to, but also narrowly tailored to providing status and stability to children.<sup>196</sup> This "gays make bad parents" argument was prevalent primarily in the 1970s.<sup>197</sup> However, scientists today

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<sup>187</sup> *World Development Indicators*, WORLD BANK (Jan. 17, 2013), available at [https://www.google.com/publicdata/explore?ds=d5bncppjof8f9\\_&met\\_y=sp\\_pop\\_totl&tdim=true&dl=en&hl=en&q=world%20population](https://www.google.com/publicdata/explore?ds=d5bncppjof8f9_&met_y=sp_pop_totl&tdim=true&dl=en&hl=en&q=world%20population).

<sup>188</sup> *Id.*

<sup>189</sup> Sam Roberts, *U.N. Says 7 Billion Now Share the World*, N.Y. TIMES, Nov. 1, 2011, at A4.

<sup>190</sup> *Monthly Estimates of the United States Population: April 1, 1980 to July 1, 1999, with Short-Term Projections to November 1, 2000*, U.S. CENSUS BUREAU (Jan. 2, 2001), <http://www.census.gov/popest/data/national/totals/1990s/tables/nat-total.txt>.

<sup>191</sup> *U.S. POPClock Projection*, U.S. CENSUS BUREAU (Mar. 1, 2013), <http://www.census.gov/population/www/popclockus.html>.

<sup>192</sup> *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980).

<sup>193</sup> H.R. REP. NO. 104-664, at 6 n.16 (1996), reprinted in 1996 U.S.C.C.A.N. 2905-23.

<sup>194</sup> *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943, at \*5 (C.D. Cal. Sept. 28, 2011).

<sup>195</sup> *Sustainability and Water*, OVERPOPULATION (Apr. 12, 2010), <http://www.overpopulation.org/water.html>. Many believe that with current population growth, Earth's water supply is unsustainable. *Id.*

<sup>196</sup> *Adams*, 486 F. Supp. at 1123.

<sup>197</sup> Stein, *supra* note 176, at 408. For recent court opinions that embrace the "gays make bad parents" argument, see *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 527-28 (Conn. 2008) (Zarella, J., dissenting); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 998-1003 (Mass. 2003) (Cordy, J., dissenting); *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006) (plurality opinion); *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality opinion). For a discussion of such arguments made in the legislative context of attempts to pass a federal constitutional amendment defining marriage as between one man and one woman, see Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 Wash. U. L.Q. 611, 658-60 (2004). Often, courts do not even evaluate any "conclusive evidence demonstrating why [opposite-sex parenting] is the 'optimal setting' for children." Vanessa A. Lavelly, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 280 (2007).



recognize that “interests of children are served equally by same-sex parents and opposite-sex parents.”<sup>198</sup> Even if gays really made bad parents, to the contrary of the House Committee’s belief that “recognizing same-sex ‘marriages’ would almost certainly have implications on the ability of homosexuals to adopt children as well,” marital and adoption rights do not always come hand in hand.<sup>199</sup> Already in 2006, reports showed that courts in twenty-one states and Washington, D.C. had granted adoptions to same-sex couples, while Massachusetts was the only state that allowed same-sex marriages at the time.<sup>200</sup> All in all, any arguments that homosexuals make bad parents, like that of the district court in *Adams*, appear vulnerable to attack by modern science. Similarly, in light of the widespread same-sex adoptions procedure, any slippery slope arguments and worries appear moot.<sup>201</sup>

Thus, while heterosexual marriages may always be more traditional in the sense that they are predated by millennia of precedent, research shows that homosexual relations are no longer vehemently condemned.<sup>202</sup> In fact, it appears that a majority of the American public accepts homosexuality and same-sex relationships.<sup>203</sup> It may be inferred that the prevailing societal mores and traditions that *Adams* and the House Committee Report refer to no longer exist. Moreover, with dictionaries no longer defining marriage as between members of the opposite sex and in light of evident questionability of the traditionally used procreation arguments, it seems wise to reevaluate the validity of the *Adams* case in light of modern social developments.<sup>204</sup>

#### 4. Judicial Developments (1982–Present)

The following section charts some of the major judicial changes of the past thirty years that affect *Adams*’s rationale. It first reiterates the successes of recent same-sex marriage litigation and follows with the position of the Supreme Court in

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<sup>198</sup> *Varnum v. Brien*, 763 N.W.2d 862, 899 (Iowa 2009).

<sup>199</sup> H.R. REP. NO. 104-664, at 7 n.21 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905–23; Lavelly, *supra* note 197, at 247.

<sup>200</sup> *Gay Adoption in the U.S. and Abroad*, PUB. BROADCASTING SERV. (Apr. 7, 2006), <http://www.pbs.org/now/politics/fightforfamily3.html>; *Goodridge*, 798 N.E.2d at 948.

<sup>201</sup> Lavelly, *supra* note 197, at 272–73.

<sup>202</sup> Koppelman, *supra* note 114, at 942–43.

<sup>203</sup> *Majority Continues to Support Civil Unions*, PEW RES. CENTER (Oct. 9, 2009), <http://www.people-press.org/2009/10/09/majority-continues-to-support-civil-unions/>.

<sup>204</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 761 (11th ed. 2008); BLACK’S LAW DICTIONARY 1059 (9th ed. 2009); *Varnum v. Brien*, 763 N.W.2d 862, 899 (Iowa 2009); Forde-Mazrui, *supra* note 10, at 315.

*Lawrence v. Texas*.<sup>205</sup>

Contrary to the rationale of the district court in *Adams*, courts today have upheld same-sex marriages.<sup>206</sup> Starting with *Baehr*, a number of courts have stricken prohibition of same-sex marriages based on violations of either the federal or the state's constitution.<sup>207</sup> Closer to home to the *Adams* court, in *Perry v. Schwarzenegger*,<sup>208</sup> the Northern District of California ruled that Proposition 8, an amendment to the California Constitution limiting marriage to a union of one man and one woman, violated Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>209</sup> In *Varnum v. Brien*,<sup>210</sup> the Iowa Supreme Court found that a statute limiting marriage to a union between a man and a woman violated the state constitution.<sup>211</sup> It is clear that the approach taken by the judicial apparatus has changed.<sup>212</sup> If only for the above reasons, it is time for lower courts within the Ninth Circuit to reconsider *Adams* or at least approach the case very cautiously as precedent.

Additionally, the negative view of homosexuality previously promulgated by the Supreme Court of the United States has also changed.<sup>213</sup> In the 1980s, in two decisions the Supreme Court made clear that it was not ready to extend positive rights to homosexuals.<sup>214</sup> An important change occurred in 2003 with

<sup>205</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>206</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum*, 763 N.W.2d. 862.

<sup>207</sup> *Baehr*, 852 P.2d at 68; *Goodridge*, 798 N.E.2d at 948; *Kerrigan*, 957 A.2d at 415; *Varnum*, 763 N.W.2d. at 872.

<sup>208</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d. 921 (N.D. Cal. 2010). California used to allow same-sex marriages following a 2008 California Supreme Court case but shortly after the state adopted a constitutional amendment that ended the practice. In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

<sup>209</sup> *Perry*, 704 F. Supp. 2d at 994–98; CAL. CONST. art. I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).

<sup>210</sup> *Varnum*, 763 N.W.2d. 862.

<sup>211</sup> *Id.* at 872.

<sup>212</sup> Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1383–85 (2010).

<sup>213</sup> Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1901 (2004). Some have voiced the opinion that today's Supreme Court is even ready to take on the issue of same-sex marriage and decide in its favor since it “has not always waited for the values of society to change.” See, e.g., Justin Driver, *Why this Supreme Court could be the best hope for gay-marriage advocates*, WASH. POST, June 25, 2011, [http://www.washingtonpost.com/opinions/why-this-supreme-court-could-be-the-best-hope-for-gay-marriage-advocates/2011/06/20/AGFLnhjH\\_story\\_2.html](http://www.washingtonpost.com/opinions/why-this-supreme-court-could-be-the-best-hope-for-gay-marriage-advocates/2011/06/20/AGFLnhjH_story_2.html).

<sup>214</sup> *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504–05 (1985) (holding that only “normal sexual appetites” which appeared to exclude homosexuality, are protected by free speech); *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986). *Bowers* upheld a Georgia sodomy statute which provided a punishment for the crime of sodomy of up to twenty years. *Id.*; Tribe, *supra* note 213, at 1900 n.19. The statute defined sodomy as “any sexual

*Lawrence v. Texas*.<sup>215</sup> In that case the Supreme Court invalidated as unconstitutional a Texas sodomy law.<sup>216</sup> Many called this the “most significant legal victory in the gay rights movement.”<sup>217</sup> Soon a decade will pass since the *Lawrence* decision and the Supreme Court has yet to address same-sex marriage.<sup>218</sup> When *Lawrence* was decided, Massachusetts had not even begun issuing marriage licenses to same-sex couples.<sup>219</sup> Thus, given the evident lack of hesitation of state courts to rule in favor of same-sex marriage and in light of the increase in the Supreme Court’s acceptance of homosexuality, lower courts referring to aged precedent such as *Adams* should very cautiously evaluate the reasoning of the previous decisions in light of modern developments.<sup>220</sup>

### III. LOOKING FORWARD: A DOMA-FREE WORLD

*Lui*’s reliance on *Adams* evidences that *Adams* remains good law as precedent for not granting spousal status to bi-national, same-sex couples under U.S. immigration laws. It is so even after the passage of DOMA and despite the political, social, and judicial developments of the past three decades.<sup>221</sup> The passage of DOMA “did not change the prior federal marriage-recognition

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act involving the sex organs of one person and the mouth or anus of another.” GA. CODE ANN. § 16-6-2 (1984).

<sup>215</sup> Andrew D. Cohen, *How the Establishment Clause Can Influence Substantive Due Process: Adultery Bans After Lawrence*, 79 FORDHAM L. REV. 605, 605 (2010).

<sup>216</sup> *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). Unlike the Georgia sodomy statute, the Texas law only applied to homosexuals and stated that a “person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.” *Id.* at 563; Tex. Penal Code Ann. § 21.06(a) (2003).

<sup>217</sup> Dean E. Murphy, *Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, June 27, 2003, at A20. While the decision did not in any way “imply recognition of same-sex marriage,” many saw the decision as paving the way to same-sex marriage. Linda Greenhouse, *Supreme Court Paved Way for Marriage Ruling with Sodomy Law Decision*, N.Y. TIMES, Nov. 19, 2003, at A24. In the very least, the decision “anchored the gay-rights claim at issue in the case firmly in the tradition of human rights at the broadest level.” *Id.*

<sup>218</sup> *Lawrence*, 539 U.S. at 558; Chase D. Anderson, *A Quest For Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review After Perry*, 60 DUKE L.J. 1413, 1415 (2011). Scholars have voiced a belief that *Perry v. Schwarzenegger* has a chance of becoming the case that brings the topic of same-sex marriage to the Supreme Court. *Id.* at 1416; *Perry v. Schwarzenegger*, 704 F. Supp. 2d. 921 (N.D. Cal. 2010).

<sup>219</sup> *Lawrence*, 539 U.S. at 558; Belluck, *supra* note 116.

<sup>220</sup> Tribe, *supra* note 213, at 1895.

<sup>221</sup> Some scholarly work questioning the future role of *Adams* in case DOMA is repealed or invalidated has previously been published by scholars. See, e.g., Titshaw, *supra* note 32, at 546. *Lui*’s resurrection of *Adams* together with the recent congressional success in pushing the Respect for Marriage Act through committee only makes the issues previously addressed by scholars more pressing. *Lui v. Holder*, No. 2:11-CV-01267-SVW(JCGx), 2011 WL 10653943, at \*3 (C.D. Cal. Sept. 28, 2011); Respect for Marriage Act, S. 598, 112th Cong. (2011).

rule.”<sup>222</sup> Today, DOMA serves as a “place-holder” and even if repealed, worries exist that same-sex couples “might not be treated as married by the federal government as to some particular program.”<sup>223</sup>

With respect to immigration benefits specifically, if DOMA is simply repealed without replacement, the second prong of the *Adams* test—that the state marriage must qualify under the INA—might be resurrected by the courts.<sup>224</sup> It is entirely possible that without more guidance from Congress, some lower courts could conclude that for the purposes of federal immigration law same-sex marriage does not confer spousal status even if DOMA is repealed.<sup>225</sup> Such finding might also be more difficult to judicially challenge because only rational basis inquiry is used by the courts in evaluating laws pertaining to the entry and exit of aliens.<sup>226</sup> Accordingly, it is important that the federal legislature pays good attention to any unintended consequences of a possible DOMA repeal. This section charts two specific solutions that can help ensure that bi-national, same-sex couples are granted spousal status for immigration purposes in the event DOMA is repealed.

First, Congress should not seek to repeal DOMA without replacement. Instead, it should specifically enact a statute, which states that an individual is considered married for the purposes of federal law if that individual’s marriage is valid in the state or country where the marriage was entered into. This phrasing follows the example of the 2011 Respect for Marriage Act and helps alleviate worries of *Adams*’s resurrection after the repeal of DOMA.<sup>227</sup> An even better replacement would include an amendment specific to the INA. This could include the grant of spousal status under U.S. immigration law to couples with valid civil unions and domestic partnerships.

Second, whether or not DOMA is repealed or remains on the

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<sup>222</sup> Wardle, *supra* note 114, at 956.

<sup>223</sup> *Id.*; Tara Siegel Bernard, *What a Repeal of the Gay Marriage Ban Means*, N.Y. TIMES BLOG (June 9, 2011, 4:23 PM), <http://bucks.blogs.nytimes.com/2011/06/09/what-a-repeal-of-the-gay-marriage-ban-means/>.

<sup>224</sup> *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982); Titshaw, *supra* note 32, at 601–05.

<sup>225</sup> Titshaw, *supra* note 32 at 603–04.

<sup>226</sup> *Demore v. Kim*, 538 U.S. 510, 511 (2003) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”); *Boutilier v. I.N.S.*, 387 U.S. 118, 123 (1967) (“It has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (noting that courts should defer to Congress in the immigration field and only evaluate any laws for rationality).

<sup>227</sup> Respect for Marriage Act, S. 598, 112th Cong. (2011).

books, courts should approach the use of *Adams* as precedent very cautiously. As shown, the cultural context has vastly changed with respect to homosexuality since the 1980s and especially so in the last decade.<sup>228</sup> If the Ninth Circuit is confronted with *Adams* in the future, the tribunal should reevaluate its reasoning in light of modern developments.

#### CONCLUSION

The *Lui* court seemed to hang on every word of the *Adams* decision. Yet, it disregarded the district judge's final and most powerful words. Chief Judge Irving Hill then concluded that "[t]he time may come, far in the future, when contracts and arrangements between persons of the same sex who abide together will be recognized and enforced."<sup>229</sup> Over thirty years have passed. The social, political, and judicial changes that this country and the world have seen make it clear that we are now far in the future. Gay marriage has been recognized by a number of states and foreign countries.<sup>230</sup> The social mores that played such an integral part of the *Adams* decision and DOMA's rationale are rapidly changing.<sup>231</sup> Many courts around the country have debated the topic of same-sex marriage and ruled in favor of gay rights activists and same-sex couples.<sup>232</sup> The Supreme Court has taken an affirmative step to support gay rights in *Lawrence v. Texas*.<sup>233</sup> This is just a brief recapitulation of the changed circumstances that undermine the validity of *Adams* today.

It is questionable whether DOMA will be repealed, judicially invalidated, or will remain valid law. With either possibility, however, judges facing DOMA challenges should critically evaluate the precedent used to support their holdings. Specifically in the context of immigration benefits for bi-national couples, *Adams* might officially still be good law, yet the changed circumstances presented in this Note call for a critical review of the case by any court seeking to refer to *Adams* as precedent. Only by paying close attention to our constantly changing world can the judiciary truly perform its function. One day, perhaps

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<sup>228</sup> Koppelman, *supra* note 114, at 940–43.

<sup>229</sup> *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980).

<sup>230</sup> *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 2013), <http://www.ncsl.org/default.aspx?tabid=16430>; *Same-sex marriage around the world*, CBC NEWS (May 29, 2009), <http://www.cbc.ca/news/world/story/2009/05/26/f-same-sex-timeline.html>.

<sup>231</sup> Koppelman, *supra* note 114, at 940.

<sup>232</sup> *Forde-Mazrui*, *supra* note 10, at 287–88; *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 415 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

<sup>233</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

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soon, we will live in a DOMA- and *Adams*-free world where justice adequately reflects changing cultural context.

## Addendum

August 21, 2013

When this Note was completed in December of 2011, a DOMA-free world was merely a vision. Supported by the then-recent repeal of Don't Ask, Don't Tell,<sup>234</sup> this vision became more realistic with the Senate Judiciary Committee's favorable vote on the Respect for Marriage Act in November 2011.<sup>235</sup> However, as argued in the preceding Note, such congressional repeal also posed a threat of bringing no change in the immigration context.

While it was the prospect of a congressional repeal that gave rise to the vision of a DOMA-free world, it was the power of the judiciary that in the end made it a reality.<sup>236</sup> Less than twenty years after being signed into law, in June 2013, the United States Supreme Court ruled Section 3 of DOMA unconstitutional under the equal protection guarantee of the Fifth Amendment in *United States v. Windsor*.<sup>237</sup> Fortunately, the Court's milestone decision has already led to the USCIS providing the same immigration benefits to married same-sex couples as it has to couples of opposite sexes.<sup>238</sup>

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<sup>234</sup> 10 U.S.C. § 654 (2006), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2011).

<sup>235</sup> *Senate panel OKs repeal of Defense of Marriage Act*, USA TODAY (Nov. 10, 2011), <http://usatoday30.usatoday.com/news/politics/story/2011-11-10/democrats-gay-marriage/51152184/1>; Respect for Marriage Act, S. 598, 112th Cong. (2011).

<sup>236</sup> 1 U.S.C. § 7 (2012) (held unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013)).

<sup>237</sup> The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); *Windsor*, 133 S. Ct. at 2695–96. The Court's decision came with increasing public support. Adam Nagourney, *Court Follows Nation's Lead*, N.Y. TIMES (June 26, 2013), [http://www.nytimes.com/2013/06/27/us/politics/with-gay-marriage-a-tide-of-public-opinion-that-swept-past-the-court.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/27/us/politics/with-gay-marriage-a-tide-of-public-opinion-that-swept-past-the-court.html?pagewanted=all&_r=0). In fact, months before the decision was made, even its signer, Bill Clinton, expressed his support for overturning the law. Bill Clinton, *It's time to overturn DOMA*, WASH. POST (Mar. 7, 2013), [http://articles.washingtonpost.com/2013-03-07/opinions/37528448\\_1\\_doma-defense-of-marriage-act-marriage-equality](http://articles.washingtonpost.com/2013-03-07/opinions/37528448_1_doma-defense-of-marriage-act-marriage-equality). Unlike Clinton, Barack Obama has openly opposed DOMA for a number of years. David Nakamura, *Obama backs bill to repeal Defense of Marriage Act*, WASH. POST (July 19, 2011), [http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI\\_story.html](http://www.washingtonpost.com/politics/obama-backs-bill-to-repeal-defense-of-marriage-act/2011/07/19/gIQA03eQOI_story.html).

<sup>238</sup> *Same-Sex Marriages*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 2, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD>.